***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

753

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,380

Northaleen Boney, Appellant

v.

United States of America, Appellee

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA



WORTH ROWLEY

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Attorney for Appellant
(Appointed by this Court)

## QUESTION PRESENTED

The District Court erred in summarily denying this indigent appellant a transcript of his preliminary hearing before the United States Commissioner, and thus deprived him of a fair trial and of effective representation by counsel.

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| | ) | |
| Appellee | ) | |

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

# BRIEF FOR APPELLANT

## JURISDICTIONAL STATEMENT

Appellant was indicted under 22 D. C. Code §§ 2901, 502, and 505(b), for robbery, for two counts of assault with a dangerous weapon (pistol), and for assault with a dangerous weapon upon a member of the Metropolitan Police Department engaged in the performance of his official duties. The District Court had jurisdiction by virtue of D. C. Code § 24-401 (1961).

Appellant was convicted and sentence was imposed. The trial court, after hearing, granted the appellant upon his seasonable affidavit leave to proceed on appeal without prepayment of costs. Jurisdiction is vested in this Court to decide this appeal by virtue of 28 U.S.C. § 1291 and 28 U.S.C. § 1294.

## STATEMENT OF THE CASE

Appellant, an indigent, was arrested on May 11, 1965, near the scene of the crimes for which he stands convicted, and continuously since that time he has been in custody. At his preliminary hearing on May 18, he was represented by Legal Aid counsel. At that hearing, witnesses who subsequently testified in behalf of the government at his trial appeared and gave testimony against him.

By a four-count indictment filed June 14, 1965, the appellant was charged with robbery, assault with a dangerous weapon, and assault on a member of the police force.

After the appellant was indicted, the court below appointed succeeding legal counsel to represent him at the trial. Appellant's trial counsel on March 16, 1966, at appellant's request, moved for a copy of the preliminary hearing transcript on the grounds that the appellant was without funds to purchase it, that it was "essential to the preparation, conduct of the trial, and defense" of the appellant, and that it was not otherwise available to him. A copy of this motion is attached hereto as Appendix A. On March 24, 1966, a hearing was had on the motion, and it was summarily denied, as appears from the stenographic record attached hereto as Appendix B.

Thereafter, in April 1966, the appellant was tried before a jury which, after he presented no evidence in his own behalf, found him

guilty as indicted. In June 1966, the appellant was sentenced under the provisions of the Federal Youth Correction Act for a period of twelve years, and is presently serving that sentence.

By motion filed in this Court, on December 16, 1966, the appellant sought an order from this Court supplementing the record herein with a transcript of the appellant's preliminary hearing so as to assist appellant in presenting this appeal and to assist this Court in deciding the case. By order filed January 6, 1967, this application was denied, "it further appearing that the clerk of this court has been informed by said [United States] Commissioner that a tape recording of the proceedings before him in this case is available and will be played to counsel on his oral request." When appellant's present counsel sought to hear the recording in question, he was informed by the Commissioner that none was ever made, but that the hearing was taken down stenographically. The stenographer in question having moved to North Carolina, repeated inquiries of her made by appellant's counsel finally gleaned the information that the notes in question are not in her possession. The United States Commissioner advises that he does not know where the stenographer's notes are, or whether they are still in existence.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Criminal Justice Act of 1964, Public Law 88-455; 78 Stat. 552; 18 U.S.C. § 3006A. Adequate representation of defendants.

"(e) Services Other Than Counsel. --Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. The court shall determine reasonable compensation for the services and direct payment to the organization or person who rendered them upon the filing of a claim for compensation supported by an affidavit specifying the time expended, services rendered, and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source. The compensation to be paid to a person for such service rendered by him to a defendant under this subsection, or to be paid to an organization for such services rendered by an employee thereof shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred.

## STATEMENT OF POINTS

1. The District Court erred in denying appellant's motion for a transcript of his preliminary hearing.

2. The appellant was unconstitutionally denied a fair trial and deprived of his constitutional right to adequate representation by counsel when he was compelled to stand trial without a transcript of his preliminary hearing which he reasonably claimed was necessary to his defense.

## SUMMARY OF ARGUMENT

The District Court erred in denying this indigent appellant a transcript of his preliminary hearing. Under the Criminal Justice Act of 1964, the appellant was entitled to the transcript on the basis of the timely application which he made.

The District Court's error was unconstitutionally prejudicial, denying the appellant a fair trial and adequate representation by counsel. Moreover, the District Court's action deprived the appellant of the benefit of the discovery which the preliminary hearing is intended to furnish to him. In essence, the District Court denied the appellant access to admissible evidence which would have been available to him were he not an indigent.

The right to a fair trial implies adequate opportunity to obtain and present evidence in one's behalf, and meaningfully to cross-examine the government's witnesses. The right to adequate representation by counsel implies that counsel be fully apprised of all proceedings in the case. Where, as here, the indigent defendant is represented by successive court-appointed counsel, this right is of great importance, and cannot constitutionally be limited by arbitrary action denying access to records in the case. Because these rights are constitutional in character, denial of them to this appellant was prejudicial as a matter of law unless the government shows, as it has not, and cannot, that the error was "harmless beyond a reasonable doubt."

## ARGUMENT

### I. The District Court erred in denying this indigent appellant a transcript of his preliminary hearing.

The Criminal Justice Act of 1964 (Public Law 88-455; 78 Stat. 552; 18 U.S.C. §3006A; approved August 20, 1964) provides in subsection (e) that counsel for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in his case may request them in an ex parte application. This is precisely what appellant's court-appointed trial counsel did by formal motion, a copy of whereof is attached hereto as Appendix A. This statute is mandatory. It provides that upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, that the court shall authorize counsel to obtain the services on behalf of the defendant. In this case the uncontroverted showing made to the court by the motion and by oral representations of counsel brought the application for a transcript squarely within the statute, so that the denial of the motion represented arbitrary, capricious and illegal action. This seems clear from the proceedings on the motion, the stenographic record whereof is reproduced as Appendix B hereof.

The procedure followed by court-appointed trial counsel for the appellant in this case represented a conventional, necessary step in

the fulfillment of his responsibilities under the Criminal Justice Act of 1964. See "The Preliminary Hearing," E. Barrett Prettyman Fellows, 1965-1966 (Lerner Law Book Co., Wash., D.C., 1967), especially pages 36-38. In contrast, the action taken by the court below is anomolous, inconsistent with and violative of both the letter and the spirit of the statute, unsupported by reason or authority, and infringing the indigent appellant's constitutional rights to a fair trial and to adequate representation by counsel.

## II. The District Court's error was unconstitutional and prejudicial, denying the appellant a fair trial and adequate representation by counsel.

As an indigent who for lack of bail money was obliged to remain in prison awaiting trial, and consequently was unable personally to investigate the facts and circumstances surrounding the crimes charged to him and to marshal evidence in his own behalf, or to hire someone to do it for him, the appellant's ability to prepare to defend himself was slight indeed. The motion for the preliminary hearing transcript represented his chief effort in that connection. The preliminary hearing is an important right of an accused, affording him a chance to learn in advance of trial the foundations of the charges and the evidence that will comprise the government's case against him. See Ross v. Sirica, ___ U.S. App. D. C. ___, ___ F.2d ___, No. 20,535, decided January 23, 1967; Dancy v. United States, ___ U.S. App D. C. ___, 361 F.2d

75 (1966); Washington v. Clemmer, 119 U.S. App. D.C. 216, 339 F.2d 715 (1964); Blue v. United States, 119U.S. App. D.C. 315, 342 F.2d 894 (1964), cert. denied 380 U.S. 944 (1965). By denying the appellant a transcript of the preliminary hearing, the court below effectively denied to the appellant for use at this trial the benefits of the preliminary hearing, and did so despite the appellant's uncontroverted and seriously advanced representations that untrue testimony was given at the preliminary hearing, and that the transcript was necessary for his defense.

In denying appellant's motion for the preliminary hearing transcript, the court below prevented a fair trial by foreclosing appellant from admissible evidence which he would have adduced in his own behalf. Cf. Howard v. United States, ___ U.S. App. D.C. ___, 278 F.2d 872 (1960). In addition, the court below foreclosed effective impeachment of government witnesses. If, as the appellant represented through his counsel to the court below, testimony given at the preliminary hearing was not true, appellant could not, without the transcript, effectively use this important fact in his defense at the trial. "Use of the preliminary hearing to lay the groundwork for impeachment of a government witness at the trial does not amount to much if no record of the hearing is available." 8 Moore, Federal Practice ¶ 5.04[4], at note 33.

In this case ten and one-half months elapsed between the preliminary hearing and the trial. During this period, appellant was represented by at least four counsel, successively. The counsel who represented him at

the trial was not the counsel who appeared in his behalf at the preliminary hearing, and thus cannot be chargeable with knowledge of what transpired at that hearing. Yet basic to any effective representation by counsel is close knowledge of the record in his case. In order to get that knowledge and thus to be able to give the appellant adequate, effective representation, appellant's trial counsel sought the transcript. When the court below denied it, that court precluded adequate, effective representation of the appellant at the trial. Cf. Tate v. U.S., 359 F.2d 245, 253 (D.C.Cir. 1966).

The government, unlike the appellant, had such access as it desired to the preliminary hearing record. For there to be a fair trial and adequate representation by counsel, the defense should have had fair, equal access. See Gregory v. United States, ___ U.S. App. D.C. ___, 369 F.2d 185 (1966).

Absent a showing by the government that the denial of the preliminary hearing transcript was error which was harmless beyond a reasonable doubt--a showing which cannot be made upon the present record--the denial of the preliminary hearing transcript constitutes reversible error. See Chapman et al v. California, ___ U.S. ___, 35 Law Week 4197 (decided February 20, 1967). See also Lollar v. United States, ___ U.S. App. D.C., ___, ___ F.2d ___, No. 20,300, decided March 20, 1967.

## CONCLUSION

Because the appellant was umproperly denied a transcript of his preliminary hearing, and thereby was deprived of a fair trial and adequate

representation by counsel, his conviction should be set aside and this cause remanded for a new trial in the light of that transcript if it still can be made available, or, if it cannot, in the light of supplementary discovery proceedings which would serve the purpose of the transcript.

Respectfully submitted,

Worth Rowley
Attorney for Appellant
1901 N Street, N. W.
Washington, D. C. 20036
(Appointed by this Court)

Dated: March 23, 1967

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff | ) | |
| vs. | ) | Criminal No. 634-65 |
| NORTHALEEN BONEY, Defendant | ) | |

MOTION TO GRANT TRANSCRIPT AT PRELIMINARY HEARING

COMES NOW the defendant, Northaleen Boney, by and through his attorney, respectfully moves this honorable court to order a transcript of preliminary hearing at no cost to the defendant, and for reasons therefore states as follows:

1. Attached hereto and made a part of this motion is correspondence from the defendant dated March 9, 1966.

2. The defendant is without adequate funds with which to purchase the aforesaid transcript.

3. The transcript is essential to the preparation, conduct of the trial, and the defense of the defendant.

4. The transcript of the preliminary hearing is not otherwise available to the defendant.

5. And for other reasons that will be advanced at the oral hearing of this motion.

SICILIANO & DALY

By /Anthony J. Siciliano/
Suite 602 RCA Bldg.
1725 K Street, N.W.
Washington, D.C. 20006
Attorneys for Defendant

[Certificate of Service and Notice of Hearing omitted]

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| vs. | : | Criminal Case No. 634-65 |
| NORTHALEEN BONEY | : | |

Washington, D. C., March 21, 1966

BEFORE THE HONORABLE CHIEF JUDGE, MATTHEW F. MCGUIRE, Preliminary Matter.

APPEARANCES:

PAUL SHERIDAN, Esq., for the Defendant.

PROCEEDINGS

MR. SHERIDAN: Your Honor, may [sic] name is Paul Sheridan with Anthony Siciliano, and I represent Northaleen Boney in Criminal case No. 634-65.

We have a motion in the file for a transcript of the preliminary hearing.

I checked with the Commissioner's office, and I was told that I could have that transcript in one day.

THE COURT: Well, now, what is the purpose of that transcript?

MR. SHERIDAN: To let us know what is in it. We don't know if there is anything in it that will necessarily be helpful or not.

THE COURT: If you are merely asking for a transcript out of curiosity, I will deny it because it costs money.

I am on the Budget Committee of the United States Courts. We are spending over $300,000 a year on transcripts now.

MR. SHERIDAN: I would --

THE COURT: Tell me why you want it.

MR. SHERIDAN: Your Honor, the defendant has told me that the testimony given at the preliminary hearing was not

true, and whether this is true or not, I can't say.

THE COURT: What did he say? Has he been indicted?

MR. SHERIDAN: Yes, sir.

THE COURT: Doesn't that cure any defect in the preliminary hearing as a matter of law?

MR. SHERIDAN: Your Honor, what the defendant is leading us to believe is true about what testimony we can expect at the trial, and --

THE COURT: What has he led you to believe is true?

MR. SHERIDAN: It is going to relate to the happening at the scene of the crime.

THE COURT: I know but that is merely a descriptive narrative. What specifically will be narrative?

MR. SHERIDAN: The narrative as I expect it from the government's viewpoint is --

THE COURT: You are talking about the defendant, what the defendant led you to believe.

MR. SHERIDAN: The defendant will state that he was at the scene of the liquor store but not in the liquor store. He was not on the side of the street where gunfire was -- took place.

THE COURT: Did he testify that way before the

Commissioner?

MR. SHERIDAN: I do not know that as a matter of fact, Your Honor.

THE COURT: If he testified at all, he must have testified one way or the other, either he was there or he was not. I assume that he testified he was not, and the other witnesses testified that he was.

That is a matter of defense for trial. Denied.

Thank you very much.

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This record is certified by the undersigned to be the official transcript in the above-entitled proceedings.

/Dawn T. Copeland, Official Court Reporter/
Dawn T. Copeland, Official Court Reporter

WILBUR K. MILLER

5/17/67
Reg Mail
10:00 am

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,380

NORTHALEEN BONEY, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*


DAVID G. BRESS,
*United States Attorney.*
FRANK Q. NEBEKER,
EDWARD T. MILLER,
*Assistant United States Attorneys.*


Cr. No. 634-65

## QUESTION PRESENTED

Has appellant made the requisite showing of need which would make the denial of his motion for a transcript of his preliminary hearing, heard approximately a week before trial and over seven months after counsel's appointment, an abuse of the court's discretion? Does this record show that appellant was prejudiced by his failure to obtain such a transcript so that despite the strong case against him his conviction ought to be reversed?



261-834—67

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NORTHALEEN BONEY, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR APPELLEE

### COUNTERSTATEMENT OF THE CASE

Appellant Northaleen Boney was jointly indicted with his co-defendant Daniel Borrero in a four count indictment (Cr. No. 634–65) charging them with one count of robbery (22 D.C. Code § 2901), two counts of assault with a deadly weapon (22 D.C. Code § 502) and one count of assault on a police officer (22 D.C. Code § 505(b)), filed June 14, 1965. On the government's oral motion granted September 24, 1965 the case against Douglas M. Boney, who was indicted on one count of robbery and three counts of assault arising from the same robbery (Cr. No. 822–65) was consolidated with this case. A two day motion to suppress and three day trial to a jury before Judge Spottswood W. Robinson, III, beginning March 30 resulted in the conviction of all three defendants as indicted on April 7, 1966. Appellant was sentenced pursuant to the Federal Youth Correction Act (18 U.S.C. § 5010(b)) to a term of 12 years or until

discharged by the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. § 5017(d).

The record of trial shows that at 7:15 of the evening of May 11, 1965 three men, identified as Douglas Boney, his brother Northaleen Boney, and Daniel Borrero, held up Bernstein's Reliable Liquor Store at 39 M Street, Southwest (Tr. 103–05, 391–92). This entry into the store was their third that day. Irwin Bernstein, manager of the liquor store owned by his father, had noticed them when they had entered at 5:00 p.m. to purchase liquor and again at 7:00 p.m. when they purchased some juice because they were strangers in a neighborhood store (Tr. 103–05). When the holdup occurred, the witness John McCray was awaiting his change from a purchase assisted by Bernstein, who was talking on the phone (Tr. 175, 400). Two of the employees of the store, Crawford and Goldson, were pushed back and required to lie on the floor in a corner of the store (Tr. 108–10, 395). Northaleen Boney struck Bernstein on the head with a bottle (Tr. 110). When McCray, having completed his purchase, was attempting to leave when the appellant Douglas Boney detained him and after a scuffle hit him behind the head with a bottle or gun or similar hard object so that he fell out the door of the store (Tr. 391–92, 401). Ernest B. Toyer arrived to make a purchase while the robbery was in progress (Tr. 175). He was struck behind the ear (Tr. 187). Told of the holdup on entering, he was ordered to move toward the refrigerator in the store. But his failure to move fast enough prompted an exclamation from one of the robbers and when he got to the refrigerator and was against it facing it, a bullet fired by Borrero hit the refrigerator an inch from his head (Tr. 188, 206, 215). He identified Northaleen Boney and Borrero as two of the robbers at trial (Tr. 189).

In the meantime Bernstein had put down the phone and was forced with Borrero's gun pointed at his head to open the cash registers and then the safe while Northaleen Boney removed the contents of the registers and, with his brother's aid, the contents of the safe. The proceeds of the robbery from the liquor store ultimately amounted to $1,800. (Tr. 110–13, 124–25.) Douglas Boney also pulled the telephone wire's out (Tr.

112). But while the robbery was still in progress, a police scout car containing Officers Giles and Thompson arrived, its red emergency light flashing (Tr. 112, 114, 191, 228, 244, 302). Through the display window the officers saw Bernstein inside with his hands up (Tr. 114, 260, 281). The robbers, in their haste to leave, dropped the coins they had been in the process of taking from the safe. Most of the stolen money was handed to Douglas Boney (Tr. 114–15). But Northaleen Boney stuffed a share into his socks where it was discovered and recovered after his arrest and the search as he was put in the police patrol wagon (Tr. 266, 292–93, 295–97). Borrero took Bernstein's personal wallet containing five hundred dollar bills and $23 in smaller denominations (Tr. 113, 125–26). It was recovered from his pocket at the scene after his arrest (Tr. 266, 306–08).

In leaving the store with their hostages as shields, Borrero, on Douglas Boney's advice, took Bernstein, the pistol still pointed to his head; Northaleen Boney put his hand in his pocket in a manner which affected his carrying a gun and motioned Toyer toward the door (Tr. 114–15, 191). The police having taken their positions near the entrance to the store riveted their attention on Bernstein followed by Borrero. Toyer followed by Northaleen Boney also emerged from the store (Tr. 114–15, 231, 258, 275–76). Spotting Officer Giles, Borrero fired a shot at him. At that moment, Bernstein stepped forward permitting Officers Thompson and Giles each to fire a shot at Borrero. Finding Borrero's gun pointed away from him, Bernstein seized the opportunity to lunge for it and overpower Borrero with the aid of a bystander (Tr. 115–17, 163–64, 194, 235, 252, 262, 264, 266, 277). As Toyer was passing through the door, he turned and knocked Northaleen Boney down and ran to the side of the building where Thompson was located (Tr. 193–94). Officer Giles, separated from his partner Thompson by the scout car, approached Northaleen Boney who was watching Borrero's struggle and grabbed him behind the neck throwing him off balance until Thompson arrived, gun drawn, and took custody of Northaleen Boney (Tr. 194, 265). Giles then helped subdue Borrero. Borrero's pistol containing six live rounds and an expended casing were recovered and introduced into evidence

(Tr. 128, 211, 239, 267–68). In the meantime, Douglas Boney made good his escape, apparently unnoticed (Tr. 194, 236, 250, 266). He was arrested approximately a month later under unrelated circumstances. Some additional facts pertinent to the argument are set forth *infra* and need not be repeated here.

## SUMMARY OF ARGUMENT

I

Considering the belatedness of appellant's request for a transcript of his preliminary hearing, filed just two weeks before his trial and more than seven months after his indictment, and the absence of the requisite showing of need, denial of the District Court did not abuse its discretion in denying the request. So far as the record shows, the District Court was not presented with any allegation that such a transcript might not be obtained or any claim for relief on this basis. Under all the circumstances and in light of his failure to show that he had exhausted the multiple other possible sources for the limited information which he claimed to seek from the transcript, no prejudice appears on this particular record. Moreover, this Court has recently affirmed without opinion the conviction of an indigent appellant who was denied a transcript of his preliminary hearing under analogous circumstances. Thus, in the opinion of appellee, appellant's contention does not require reversal, especially in light of the strong evidence upon which he was convicted.

## ARGUMENT

**I. Absent a timely showing of need and absent any showing of prejudice on the record, the denial of appellant's request for a transcript of his preliminary hearing was not reversible error**

(Tr. 105, 108, 110–13, 117, 131–36, 142–46, 150, 189–91, 193–94, 220–21, 232, 236, 264–65, 270, 285, 293, 295–96, 355–58, 358–61, 393–94, 424–26, 430–34, 437–38, 448–50)

The substance of appellant's contention on this appeal is that his conviction, despite the exceedingly strong case against

him,[1] should be reversed solely because his request as an indigent for a transcript of his preliminary hearing was denied.[2] He has shown no actual prejudice from the denial. No claim for relief based on the unavailability of a recording of the preliminary hearing was ever presented to the court below which, for all this record shows, was never notified of this aspect of the problem.[3] The fact that he delayed from May 18, 1965, the date of his preliminary hearing, or even from July 27, 1965, the date

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[1] This appellant was convincingly identified as one of the robbers by several witnesses. His participation in the robbery while within the liquor store and while attempting to escape, using a hostage as his shield, was described in detail. A large quantity of packaged money described as the proceeds of the robbery was recovered from his socks after he was apprehended at the scene of the crime. (Tr. 105–08, 110–13, 117, 138–40, 142–46, 150, 189–91, 193–94, 232, 236, 264–65, 285, 293, 295–96, 393–94.)

[2] No claim requiring appellate review of the Commissioner's finding of probable cause is raised in this appeal and so a transcript was not necessary for this purpose. See *Washington* v. *Clemmer*, 119 U.S. App. D.C. 216, 339 F. 2d 715 (1964). *Tate* v. *United States*, — U.S. App. D.C. —, 359 F. 2d 245 (1966) is inapposite since that decision concerns only the right of indigents to transcripts as basis to their exercise of appellate rights, not as an incident to the preparation for trial.

[3] The representation by the United States Commissioner that a taped recording of the preliminary hearing was available referred to in this Court's order of January 6, 1967 has since proved to be in error. Appellee invites the Court to judicially notice that though such recordings are normally made in cases such as this one where an accused is represented by Legal Aid counsel, the entire Reel 4 of the series of such recordings in the custody of the United States Commissioner upon which this preliminary hearing would have been recorded, failed to record, with the exception of one unrelated hearing. Appellee does not contest appellant's assertion that stenographer's notes are not now available.

In *Boney* (*Mackey & Costin*) v. *United States*, No. 19,922–24, D.C. Cir., July 27, 1966 (affirmed by per curiam order) this court without opinion affirmed the District Court's denial of transcripts where there was an insufficient showing of need, but the tape recording of the preliminary hearing was available to counsel. However, the issue presented in the instant case is more nearly analogous to that presented in (*David*) *Monroe* v. *United States*, No. 20,345, D.C. Cir., January 5, 1967 (affirmed by per curiam order) in which this Court without opinion affirmed the conviction of an indigent appellant who had sought a transcript of his preliminary hearing held before a judge of the District of Columbia Court of General Sessions, had obtained an order from the United States District Court for the transcript, but was prevented from obtaining the transcript by the administrative difficulties attendant upon an unresolved legal issue. He had in effect abandoned his claim by going

his counsel whose associate eventually tried the case was appointed, until March 16, 1966, over seven months later and just two weeks before the trial, to file his motion requesting the transcript, made the motion so untimely for the non-specific purpose for which it was sought as to dissipate any claim of prejudice on this record (Tr. 449–51).*

Absent the requisite showing of need, denial of appellant's request for a transcript by the District Court was not an abuse of discretion. *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 323 F. 2d 808 (1963), *cert. denied*, 379 U.S. 905 (1964). Cf. *Neufield* v. *United States*, 73 App. D.C. 174, 118 F. 2d 375 (1941), *cert. denied*, 315 U.S. 798 (1942). In appellee's opinion, such a showing has never been made. The mere fact that appellant

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to trial without vindicating his claim. That case seems for all practical purposes indistinguishable from this one.

Appellee simply does not comprehend the basis for appellant's assertion that "The government, unlike the appellant, had such access as it desired to the preliminary hearing record. For there to be a fair trial and adequate representation by counsel, the defense should have had fair and equal access." Brief of Appellant, p. 9. Appellee has discovered no support for an assertion of unequal access.

* Appellee respectfully disagrees with the apparently intended implication of appellant's assertion that "In this case ten and one-half months elapsed between the preliminary hearing and the trial. During this period appellant was represented by at least four counsel, successively. The counsel who represented him at the trial was not the counsel who appeared in his behalf at the preliminary hearing and thus cannot be chargeable with knowledge of what transpired at that hearing." Brief of Appellant, pp. 8–9.

At this preliminary hearing on May 18, 1965, appellant was represented by J. Patrick Hickey, Legal Aid Agency Staff Attorney. On June 15, 1965, David Aaronson was appointed to represent him. That counsel assisted appellant at his arraignment on June 16. On July 27, 1966 Aaronson's appointment was vacated and Anthony J. Siciliano was appointed. The appearance of Paul F. Sheridan was filed on March 30, 1966, though he had argued the motion for the transcript of the preliminary hearing on March 21. On March 30, 1966, Judge Robinson, the trial judge, after extended inquiry, granted the request of Mr. Siciliano and ordered that his appointment be vacated. Mr. Sheridan was appointed in his place with appellant's consent. It was disclosed at that inquiry that Sheridan, Siciliano's associate, had in effect been appellant's counsel from the time of Siciliano's appointment, though the two men had consulted frequently, and that the series of interviews that Sheridan had conducted with appellant commenced in September. (Motion Tr. (March 30, 1966) 5–7, 9–25.) It is thus apparent that there was no lack of continuity of representation by counsel or barrier to communication that appellant now suggests.

was allowed to proceed *in forma pauperis* did not entitle him as a matter of right to the transcripts of all prior proceedings at government expense for trial preparation. For instance he was not entitled to such a transcript against the mere contingency that some witness might give inconsistent testimony. *Nickens* v. *United States, supra,* at 341, 323 F. 2d at 811. Cf. *United States* v. *Shoaf,* 341 F. 2d 832 (4th Cir. 1964).

At the pre-trial motion for the transcript argued March 21, 1966, the only expressed claim was a desire to examine the transcript to ascertain whether the witnesses had put appellant inside the liquor store (Tr. (filed Feb. 23, 1967) 2–4).[5] But the Record of Proceedings before the United States Commissioner, Docket No. 17, Case No. 151, could, in all probability, have satisfied that need. That record shows that the witness Bernstein did, Officer Giles did not. Officer Giles did not claim to have seen appellant inside the store in his testimony at trial (Tr. 270). There was never a suggestion by this appellant that either of the two witnesses who testified at the preliminary hearing had testified differently at trial (Tr. 449). In fact, the only deficiency related to that proceeding he cited at trial was the

[5] The belatedness of appellant's request for a transcript of his preliminary hearing, appellee submits, increases the significance of his failure to show that he had exhausted available resources to obtain the information which might have been recorded at the preliminary hearing and militates against the likelihood of actual prejudice. Appellant did not appeal the denial of the motion, nor did he seek relief before the verdict if and when he found that even a recording of the hearing was unavailable. The inference that the information sought was non-essential or more conveniently available from other sources is thus compelling. Appellant's Legal Aid counsel at the preliminary hearing should have been available for consultation. Courtesy disclosure of the prosecutor's file might have been another source of necessary information. The record of proceedings before the Commissioner appears to outline the essential evidence adduced at the preliminary hearing from the only two witnesses who testified. Timely consultation with the clerk at the hearing might have been productive. The Grand Jury minutes might even have been sought. Full and unchallenged disclosure of Jenks statements was made by the prosecutor at appropriate times during the course of trial (Tr. 131–33, 220–21). And immediately prior to trial the hearing of a lengthy motion to suppress evidence which included the testimony of Officer Giles who was the police officer who had testified at the preliminary hearing should have revealed much of the foundation of the government's case against appellant. None of these opportunities were ever shown to have been unavailable or inadequate.

technical one that the reporter was not certified, a frivolous claim, even in his own counsel's judgment, not pursued on this appeal (Tr. 355–58, 424–26).

No attempt was made to show a need for a transcript or to claim prejudice at trial in light of the record which was there developed. The record shows no such prejudice, on its face, and in the opinion of appellee, it may be fairly concluded under the circumstances of this case that there was no actual prejudice.[6] Compare *Dancy* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 75 (1966) *supra*. The diligence of counsel which is apparent from this record refutes appellant's absurd suggestion in his brief that the motion to obtain the transcript just over a week before trial represented appellant's chief effort to prepare to defend himself. Brief of Appellant, p. 7. Thus the absence from the record of timely efforts to gain relief, either from the denial of appellant's belated request for the transcript or from any deprivation suffered during trial from the lack of the transcript or of any separate claims for relief based on the lack of a tape recording of the hearing, suggests that appellant was not deprived of any aid considered essential by his counsel to the preparation or presentation of his defense. Under such circumstances, therefore, reversal and a new trial is hardly required.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
EDWARD T. MILLER,
*Assistant United States Attorneys.*

[6] While appellant's co-defendant Borrero claimed prejudice from the lack of a transcript, the vagueness of his claim, the insignificance of even those inconsistencies in testimony that were suggested, and the untimeliness of the claim made it completely unconvincing. The court denied the motion. (Tr. 358–61, 427–28, 430–34, 448–50.)

U.S. GOVERNMENT PRINTING OFFICE: 1967

# REPLY BRIEF FOR APPELLANT

UNITED STATES COURT of APPEALS
for the DISTRICT of COLUMBIA CIRCUIT

No. 20,380

NORTHALEEN BONEY, Appellant

v.

UNITED STATES of AMERICA, Appellee

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA



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May 12, 1967

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UNITED STATES COURT of APPEALS
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No. 20,380

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NORTHALEEN BONEY, Appellant

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APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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# REPLY BRIEF FOR APPELLANT

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## I. Appellant's Motion for the Preliminary Hearing Transcript Was Timely, and Its Denial Was Error

On grounds of "belatedness" and "the absence of the requisite showing of need" the government attempts to justify the District Court's denial of appellant's motion for his preliminary hearing transcript in aid of his defense. Neither ground was relied on by the District Court,

nor has any validity at all. The motion was a necessary and seasonable effort in preparing for trial, and if allowed, would not have delayed the trial, which was two weeks away. In this connection, appellant's trial counsel stated at the hearing on the motion for the preliminary hearing transcript, "I checked with the Commissioner's office, and I was told that I could have that transcript in one day." [See Mar. 21, 1964 transcript, page 2, reproduced in Appendix B, Brief for Appellant.] The motion itself showed the appellant's need for the transcript, for it stated: "The transcript is essential to the preparation, conduct of the trial, and the defense of the defendant." [See Appendix A, Brief for Appellant.] At the hearing on the motion, appellant's trial counsel pointed out that he did not know what the preliminary hearing transcript contained, and that the appellant said that testimony given at the pre-trial hearing was not true. These statements are uncontroverted, and especially in view of the fact that appellant's trial counsel had not represented him at the pre-trial hearing,* constitute an adequate "showing of need" if one be necessary under the Criminal Justice Act of 1964.

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*The special need of succeeding counsel for full transcripts of prior proceedings at which the client was represented by other counsel has been recognized by this Court. See Tate v. United States, ___ U.S.App.D.C. ___, 395 F.2d 245, 253-254 (1966).

## II. Denial of the Motion Seriously Prejudiced Appellant's Defense, Depriving Him of a Fair Trial and Effective Representation by Counsel.*

The government also claims that the denial of the pre-hearing transcript was not prejudicial in view of the strength of the case against the appellant. This might be a compelling argument if the case were as strong as the government claims it to be, and if the content of the transcript were known. In fact, as shown hereinafter, the government grossly overstates the evidence, and the case is not nearly so strong. Moreover, whatever appearance of strength it has must be heavily discounted because of the extent to which it may result from the denial of the transcript in question. And the content of the transcript does not appear from the present record. In these circumstances, the government cannot demonstrate, as it must, that the appellant was not prejudiced by its unavailability.

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*If, in considering this point, the Court should find it necessary to review the transcript, appellant requests that the Court read the following portions thereof:

March 30, 1966 Transcript, pp. 31-89
March 31, 1966 Transcript, pp. 17-50
Trial Transcript, pp.:

| | | |
|---|---|---|
| 43-57 | 227-242 | 319-320 |
| 103-130 | 250-253 | 386 |
| 138-153 | 256-274 | 390-396 |
| 181-182 | 283-287 | 405-413 |
| 184-198 | 291-299 | 419-451 |
| 209-212 | 304-309 | 504-525 |

The evidence against the defendant is eyewitness identification and only that. He was arrested outside the robbed liquor store, in confused circumstances following the robbery. The arresting officer, who was at the scene when the robbery was underway, was dubious about the appellant's implication in the robbery and testified at a pre-trial hearing that he had asked the other officer at the scene whether "he definitely thought" the appellant was involved in the robbery. [March 31, 1966 Tr. pp. 23-24] Unfortunately, this information was not brought to the attention of the jury at the trial. Contrary to the government's claim, there was no evidence that three packets of money found in the appellant's socks when he was searched by the police were the fruits of the robbery.* Despite the government's categorical assertion in its brief that the appellant "stuffed a share [of the stolen money] into his socks, where it was discovered and recovered after his arrest and search as he was put in the police patrol wagon," there is no evidence that any robber had stuffed anything into his socks. Indeed, the evidence was contra: Mr. Irwin Bernstein, the principal robbery victim, testified at the trial that the robber he claimed was

*Mr. Bernstein, who was a victim of the robbery, testified generally under direct examination at the trial about the recovery of money from the defendants. Although Mr. Bernstein identified the money and wallet recovered from appellant's co-defendant, Borrero [Tr. 125-127], Mr. Bernstein was not even asked to identify the money taken from the appellant at the time of his arrest. Perhaps this is why the government does not refer in its brief to the Bernstein testimony at Tr. 125-127.

the appellant had taken money out of the cash register and put it in his pockets. [Tr. 111] Significantly, no such money was recovered from the appellant's pockets. The money found on the appellant when he was searched immediately after the robbery was not in wads in his pockets, but in packets in his socks. [Tr. 292, 296] By its untrue and wholly unjustifiable assertion, government appellate counsel is repeating in this Court the prejudicial and improper jury argument made by government trial counsel. [Tr. 513, 516] This wrongful argument, although challenged by appellant's trial counsel in his argument [Tr. 519], was never withdrawn or corrected by the government in its rebuttal or otherwise, and may well have misled the jury into believing that the eyewitness testimony against the appellant was confirmed by damning evidence that the proceeds of the robbery were found in his possession, when there was no such evidence. "The prosecutor may strike hard but not foul blows." King v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___, No. 19,641, decided Dec. 21, 1966. However, the government's need for this sort of testimony, as evidenced by its persistent invention of it, is obvious. Otherwise, its whole case rests upon unconfirmed testimony of eyewitnesses involved in a robbery, all of whom were strangers to the appellant.

The pre-hearing transcript is still unavailable to appellant's present counsel, despite his seasonable motion in this Court to obtain it. [See p. 3, Brief for Appellant] Unaccountably, the stenographic notes from which it

could have been prepared for use at the trial or in this proceeding seem to have disappeared, perhaps permanently. In the absence of the transcript, it is difficult for appellant to make a particularized showing which would demonstrate with precision the exact nature and extent of the prejudice to which the denial of the transcript has subjected the appellant. However, if it be germane to the Court's consideration of this appeal, appellant has represented to his present counsel that the transcript in question would show that Mr. Bernstein, who at the trial was never asked to identify the money recovered from the appellant as the fruits of the robbery, was called as a witness for the defense at the preliminary hearing, and testified that the robbers grabbed the loot in loose wads from the cash register and stuffed it into their pockets. As hereinbefore noted, the testimony in this case shows that no such money was found on the appellant when he was arrested and searched immediately after the robbery. [Tr. 292, 296] In the context of Mr. Bernstein's preliminary hearing testimony, this is a compelling item of circumstantial evidence to countervail the eyewitness testimony which would identify the appellant as one of the robbers. With no transcript of the preliminary hearing to serve as a basis for the discovery of testimony to be expected from Mr. Bernstein, or to control his testimony, it is small wonder that appellant's trial counsel did not inquire into and develop this important matter, or resist as prejudicial the introduction in evidence of the money found in the appellant's socks because it was not

shown to be the fruits of the robbery. If trial counsel had had the transcript, and had failed to pursue these matters, a serious question might arise as to whether the appellant was adequately represented by counsel at his trial. Compare Dyer v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___, No. 20,052, decided March 23, 1967.

## III. Conclusion

The appellant's motion was timely and well-grounded in fact and law. Its denial was prejudicial to the appellant. Had the motion been granted, appellant's trial could well have developed evidence to show affirmatively that the money recovered from the appellant could not have been the fruits of the robbery. Such a showing would have gone far to discredit the government's case. Since here there is every basis in the record "for an informed speculation that appellant's rights were prejudicially affected" (Lollar v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___, No. 20,300, decided March 20, 1967), appellant's conviction cannot be sustained.

Respectfully submitted,

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(Appointed by this Court)

Dated: May 12, 1967

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,380

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Northaleen Boney, Appellant

v.

United States of America, Appellee

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PETITION FOR RE-HEARING EN BANC

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To the Hon. Judges of the United States Court of Appeals for the District of Columbia Circuit:

Northaleen Boney, the defendant-appellant above-named, presents this, his petition for a re-hearing en banc in the above-entitled cause, and, in support thereof, respectfully shows:

I

The panel of the court which heard this appeal, in its opinion of affirmance herein, has clearly failed to apply the rule of Chapman v. Calif., 87 S. Ct. 824 (1967), and of Lollar v. United States, ____U.S.

App. D.C. ___, 376 F.2d 243, decided March 20, 1967 by a different panel of the court, that the denial of Constitutional right is to be deemed prejudicial as a matter of law unless the government shows, as it has not and cannot herein, that the error was "harmless beyond a reasonable doubt." Significantly, in the Lollar case, the government's petition for re-hearing was denied May 3, 1967 so that the rule of the case should be the settled law of the circuit.

In the present case, after finding error in the district judge's denial of a free copy of the transcript of the defendant's preliminary hearing, the court required no showing by the government that access to the transcript by appellant's counsel could not have changed the result of the trial. Rather, without itself reviewing the preliminary hearing transcript, the court relied wholly upon its subjective evaluation of a cold trial record which was compiled without the benefit of access to that transcript and was therefore tainted by the error in the proceedings before the district court. In the view of appellant's counsel, had the transcript been available for the appellant's use at the trial, the trial record would have been substantially different.

II

Nor did the per curiam opinion of affirmance give any consideration to the strict Constitutional doctrine of Griffin v. Illinois, 351 U.S. 12 (1956), prohibiting discrimination against indigent defendants. Appellant

made timely application to the district court for a transcript of the preliminary hearing and was denied it only because he was unable to pay for it. Under the rationale of Griffin v. Illinois, even if it were not reversible error generally to deny criminal defendants transcripts of preliminary hearings, it is clearly reversible Constitutional error to deny transcripts to indigent defendants while supplying them to those able to pay for them. True, Griffin v. Illinois applied the due process and equal protection clauses of the 14th Amendment, which is applicable to the States; but, as pointed out in Bolling v. Sharpe, 347 U.S. 497 (1954), "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for re-hearing en banc be granted and that the judgment of the district court be, upon further consideration, reversed and that the appellant be granted a new trial.

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Attorney for Appellant
(Appointed by this Court)

## Certificate of Counsel

Washington, D. C.
September 8, 1967

Pursuant to Rule 26 of the Court, I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay.

Worth Rowley